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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

20 IN RE: UBER TECHNOLOGIES, INC.,
21 PASSENGER SEXUAL ASSAULT
LITIGATION

22 This Document Relates to:

23 *A.H.M. v. Uber Technologies, Inc., et al.*,
24 3:23-cv-03482-CRB

27 *Jane Doe LS 231 v. Uber Technologies, Inc., et al.*, 3:23-cv-04367-CRB

Case No. 3:23-md-03084-CRB

**DEFENDANTS UBER TECHNOLOGIES, INC.,
RASIER, LLC, AND RASIER-CA, LLC'S
MOTION TO DISMISS PLAINTIFFS'
MASTER LONG-FORM COMPLAINT
PURSUANT TO NEW YORK LAW**

Judge: Honorable Charles R. Breyer
Date: TBD
Time: TBD
Courtroom: 6 – 17th Floor

1 *Jane Doe LS 155 v. Uber Technologies,
2 Inc., et al.*, 3:23-cv-04374-CRB

3 *A.I. v. Uber Technologies, Inc., et al.,
4 3:23-cv-04740-CRB*

5 *E.E. v. Uber Technologies, Inc., et al.,
6 3:23-cv-04744-CRB*

7 *Jane Doe LS 66 v. Uber Technologies,
8 Inc., et al.*, 3:23-cv-05414-CRB

9 *L.E. v. Uber Technologies, Inc., et al.,
10 3:23-cv-05567-CRB*

11 *Jane Doe LS 302 v. Uber Technologies,
12 Inc., et al.*, 3:23-cv-05577-CRB

13 *S.E. v. Uber Technologies, Inc., et al.,
14 3:23-cv-05869-CRB*

15 *Moore v. Uber Technologies, Inc., et al.,
16 3:24-cv-00482-CRB*

17 *Gacovino v. Uber Technologies, Inc., et
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19 *Moye v. Uber Technologies, Inc., et al.,
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21 *M.C. v. Uber Technologies, Inc., et al.,
22 3:24-cv-01347-CRB*

23 *B.C. v. Uber Technologies, Inc., et al.,
24 3:24-cv-01917-CRB*

25 *S.M. v. Uber Technologies, Inc., et al.,
26 3:24-cv-01920-CRB*

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5 *In re Uber Rideshare Cases*,
 6 No. CJC-21-005188 (Super. Ct. S.F. Cnty. Jan. 23, 2023).....6

7 *Vess v. Ciba-Geigy Corp. USA*,
 8 317 F.3d 1097 (9th Cir. 2003)12, 14

9 *In re Volkswagen Clean Diesel*,
 10 349 F. Supp. 3d 881, 914 (N.D. Cal. 2018)14, 19

11 *Voss v. Black & Decker Mfg. Co.*,
 12 450 N.E.2d 204 (N.Y. 1983).....24, 25

13 *Wargo v. Hillshire Brands Co.*,
 14 599 F. Supp. 3d 164 (S.D.N.Y. 2022).....12

15 *Wilson v. Danka Corp.*,
 16 2002 WL 31929120 (S.D.N.Y. Jan. 28, 2003)8

17 *XYZ Two Way Radio Serv., Inc. v. Uber Technologies, Inc.*
 18 214 F. Supp. 3d 179, 184 (E.D.N.Y. 2016)18

19 *Ziencik v. Snap, Inc.*,
 20 2023 WL 2638314 (C.D. Cal. Feb. 3, 2023).....24

21 *Zsa Zsa Jewels, Inc. v. BMW of N. Am., LLC*,
 22 419 F. Supp.3d 490 (E.D.N.Y. 2019)25

23 **Statutes**

24 CPUC § 53547, 11

25 N.Y. Veh. & Traf. L. §§ 1691-170023

26 N.Y. Veh. & Traf. L. § 1691 *et seq.*11

27 N.Y. Veh. & Traf. L. § 16995, 6

28 UCL.....*passim*

29 **Other Authorities**

30 Fed. R. Civ. P. 9(b)*passim*

31 Fed. R. Civ. P. 12(b)(6).....2

1	Fed. R. Civ. P. 12(f).....	17
2	Michael D. Scott, <i>Scott on Info. Tech. Law</i> , § 15.08 n.105 (3d ed. 2024 Supp.).....	23
3	Michael L. Rustad & Thomas H. Koenig, <i>The Tort of Negligent Enablement of</i> <i>Cyberspace</i> , 20 Berkeley Tech. L.J. 1553, 1577 (2005).....	23
4	Raymond T. Nimmer, Law of Comput. Tech. § 12:41 (Nov. 2023 Update).....	23
5	Restatement (Second) of Agency § 267 cmt. b.....	8
6	Restatement (Third) of Torts: Prod. Liab. § 19	23
7	S.B. 4159, 240th Sess. (N.Y. 2017).....	5, 6
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1 **NOTICE OF MOTION TO DISMISS**

2 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

3 **NOTICE IS HEREBY GIVEN** that on a date and time to be set by the Court, before the
4 Honorable Charles R. Breyer in Courtroom No. 6 on the 17th Floor of the San Francisco
5 Courthouse for the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, CA
6 94102, Defendants Uber Technologies, Inc., Rasier, LLC, and Rasier-CA, LLC (collectively,
7 “Uber”) will, and hereby do, move this Court for an order dismissing portions of the Complaint
8 brought by Plaintiffs in this coordinated action whose alleged incident occurred in New York.

9 This Motion is based on this Notice, the attached Memorandum of Points and Authorities,
10 the concurrently filed Declaration of Robert Atkins, the concurrently filed Declaration of Peter
11 Sauerwein, the concurrently filed Proposed Order, all evidence, pleadings, and papers filed
12 herewith, the entire file in this coordinated action, any Reply that may be filed in support of this
13 Motion, and any other arguments or evidence that may be presented to the Court in support of this
14 Motion.

15
16 DATED: April 1, 2024

PAUL, WEISS, RIFKIND, WHARTON &
GARRISON LLP

17
18 By: /s/ Robert Atkins

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23 *Attorneys for Defendants*
24 UBER TECHNOLOGIES, INC.,
25 RASIER, LLC, and RASIER-CA, LLC

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiffs allege that each of them was assaulted or harassed by a driver and contend that
 3 Uber is responsible for having not implemented different or additional safety measures. If the
 4 drivers behaved as alleged, that is reprehensible. But that is not sufficient to sustain the claims
 5 alleged in the Master Long-Form Complaint (the “Complaint”). Declaration of Robert Atkins
 6 (“Atkins Decl.”) Ex. 5. This Motion is directed to claims in the Complaint asserted by Plaintiffs
 7 whose alleged incidents occurred in New York, and thus are governed by New York law. Uber
 8 respectfully requests that this Court dismiss the claims addressed below, and do so with prejudice
 9 given the legal infirmity of those causes of action:

10 *Vicarious Liability for Drivers’ Torts (Cause of Action G).* Uber is not vicariously liable
 11 for sexual assaults allegedly committed by independent drivers because such conduct is outside
 12 the scope of agency under New York law.

13 *Fraud and Misrepresentation (Cause of Action C).* Plaintiffs collectively complain about
 14 Uber’s advertising, but misrepresentation claims cannot be asserted generically as a group. The
 15 Complaint therefore fails to meet the heightened pleading standard of Rule 9(b). In addition, many
 16 of Plaintiffs’ misrepresentation claims cannot have survived the class action settlement in
 17 *McKnight v. Uber Techs., Inc.*, 14-cv-05615 (N.D. Cal.) because Plaintiffs either released their
 18 claims or, if they were not part of the class, could not have relied on the “Safe Ride” representations
 19 at issue in that dispute.

20 *Negligent Infliction of Emotional Distress (Cause of Action D).* Plaintiffs cause of action
 21 for negligent infliction of emotional distress (“NIED”) is duplicative of their negligence claim.

22 *Negligent Entrustment (Part of Cause of Action B).* Negligent entrustment applies only to
 23 chattel, not, as Plaintiffs allege, Uber’s App or Uber trademarks.

24 *Strict Products Liability (Cause of Action H).* The Uber App is not a “product” and,
 25 therefore, is not subject to product liability claims. Plaintiffs also fail to allege any defect in the
 26 Uber App or any causal connection between their alleged injuries and the design of the software.

27 *Unfair Competition Law (Cause of Action I).* California’s presumption against
 28 extraterritoriality mandates dismissal of the Unfair Competition Law (“UCL”) claim. Plaintiffs

1 also fail to adequately allege any unlawful, fraudulent, or unfair business practice in violation of
2 the UCL.

Injunctive Relief. Plaintiffs are not entitled to seek injunctive relief because the Complaint fails to allege that they lack an adequate remedy at law. The Complaint also fails to allege facts establishing that any individual Plaintiff has standing to seek injunctive relief.

Punitive Damages. Plaintiffs fail to sufficiently plead that Uber acted with fraud, malice, or gross negligence warranting imposition of punitive damages.

BACKGROUND

On February 15, 2024, Plaintiffs filed a Master Long-Form Complaint alleging, en masse, that after using the Uber App to arrange for rides, each Plaintiff was sexually assaulted by an independent driver. Plaintiffs seek compensatory and punitive damages and injunctive relief based on the following claims against Uber: (1) negligence; (2) fraud and misrepresentation; (3) NIED; (4) “common carrier’s non-delegable duty to provide safe transportation”; (5) “other non-delegable duties to provide safe transportation”; (6) vicarious liability for drivers’ torts; (7) strict product liability; and (8) UCL violations.

ARGUMENT

To survive a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6),
“a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that
is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotations omitted).
Dismissal is appropriate where the allegations lack “a cognizable legal theory or sufficient facts to
support a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104
(9th Cir. 2008). In deciding a motion to dismiss, the Court is “not bound to accept as true a legal
conclusion couched as a factual allegation.” *Papasan v. Allain*, 478 U.S. 265, 286 (1986).

24 Here, based on both New York law and the insufficiency of the facts alleged, this Court
25 should dismiss Plaintiffs' claims for: (1) vicarious liability, (2) fraud and misrepresentation,
26 (3) NIED, (4) negligent entrustment, (5) strict product liability, (6) UCL violations; (7) injunctive
27 relief, and (8) punitive damages. It should also dismiss Plaintiffs' requests for injunctive relief
28 and punitive damages.

1 **I. THE NEW YORK PLAINTIFFS' CLAIMS ARE GOVERNED BY NEW YORK**
 2 **LAW¹**

3 As a court sitting in diversity jurisdiction, this Court must decide whether to apply the law
 4 of the state of the incident (New York) or the law of the forum state (California). Under the
 5 conflicts of law principles of both New York and California, the proper choice of law for all of the
 6 16 New York Plaintiffs' claims is the law of the state of the incident: New York.²

7 **A. New York Conflicts of Laws Principles Mandate Application of New York**
 8 **Law**

9 Under New York conflicts of law principles, choice of law is determined by applying an
 10 “interest analysis” test. *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679, 684 (N.Y. 1985). The
 11 interest analysis test considers which jurisdiction has the “greatest interest” in the litigation. *Id.*
 12 Under this test, the contacts considered to be most significant “are, almost exclusively, the parties’
 13 domiciles and the locus of the tort.” *Id.*

14 For assessing which jurisdiction has the greatest interest, the interest analysis test divides
 15 torts into two types: “conduct-regulating rules” (e.g., fraud and negligence) and “loss-allocation
 16 rules” (e.g., vicarious liability). *In re Thelen LLP*, 736 F.3d 213, 220 (2d Cir. 2013). For alleged
 17 torts involving conduct-regulating rules, “the law of the jurisdiction where the tort occurred will
 18 generally apply because that jurisdiction has the greatest interest in regulating behavior within its
 19 borders.” *Cooney v. Osgood Mach., Inc.*, 612 N.E.2d 277, 280 (N.Y. 1993).

20 For alleged torts involving loss-allocation rules, “the site of the tort is less important, and
 21 the parties’ domiciles are more important.” *In re Thelen LLP*, 736 F.3d at 220 (quotations
 22 omitted); *see Cooney*, 612 N.E.2d at 280 (same). For such rules, New York courts apply three
 23 further rules to determine what law governs. *See Cooney*, 612 N.E.2d at 281 (discussing and

24 ¹ To the extent this Court must decide questions of federal law, the Ninth Circuit governs. *See In*
 25 *re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1175-76 (D.C. Cir. 1987).

26 ² New York conflicts of law principles govern in: (i) the 2 actions that were originally filed in New
 27 York federal courts; and (ii) the 5 actions that were originally filed in California federal courts but
 28 which involve a contractual forum selection clause in the Terms of Use specifying the state of the
 29 incident as the proper forum. *See In re Nucorp Energy Sec. Litig.*, 772 F.2d 1486, 1492 (9th Cir.
 30 1985); *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1140 (9th Cir. 2004); Atkins Decl. Ex. 5.
 31 California conflicts of law principles govern in the remaining 9 actions that were originally filed
 32 in California and where the Plaintiff did *not* assent to the forum selection clause. Atkins Decl. Ex.
 33 5.

1 applying the three “*Neumeier* Rules”); *see Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972).
 2 First, where the parties share a common domicile, the law of the domicile controls. *Cooney*, 612
 3 N.E.2d at 281. Second, “where the parties are domiciled in different States and the local law favors
 4 the respective domiciliary,” the law of the place of injury (or “locus”) controls. *Id.* Finally, in
 5 instances where the parties are domiciled in different jurisdictions but the local law does not favor
 6 the respective domiciliary, the governing law is “the place of injury” or accident unless displacing
 7 this “normally applicable rule will advance the relevant substantive law purposes without
 8 impairing the smooth working of the multistate system or producing great uncertainty for
 9 litigants.” *Id.* (quoting *Neumeier*, 286 N.E.2d at 458).³

10 Here, New York’s interest analysis test for Plaintiffs’ conduct-regulating and loss-
 11 allocation claims require application of New York law. For Plaintiffs’ conduct-regulating claims,
 12 the New York Plaintiffs’ alleged tortious injuries occurred in New York. That is where each of the
 13 New York Plaintiffs is alleged to have used the Uber App to request a ride from an independent
 14 driver, and where each is alleged to have been assaulted by the driver. *Licci ex rel. Licci v.*
 15 *Lebanese Canadian Bank*, 739 F.3d 45, 50 (2d Cir. 2013). Notably, that conclusion holds even
 16 where plaintiffs allege that the assault itself resulted in part from allegedly fraudulent or negligent
 17 conduct occurring elsewhere. *See Thelen*, 736 F.3d at 220; *Schultz*, 400 N.E.2d at 683; *see also*
 18 *Doe #2 v. Legion of Christ, Inc.*, 588 F. Supp. 3d 240, 244-45 (D. Conn. 2022).

19 For Plaintiffs’ loss-allocation claims, since the parties generally do not share a common
 20 domicile, either the second or third of the *Neumeier* rules would apply. Defendants are
 21 incorporated or formed in Delaware and have several principal places of business, including
 22 California. The vast majority of the New York Plaintiffs - - approximately 13 out of 16 - - however,
 23 are New York residents, and none are residents of California or Delaware. If for any claim,
 24 Plaintiffs can establish that the local law of the respective parties’ domiciliary benefits that party,
 25 the law of the locus of the alleged torts - - i.e., New York - - controls under the second *Neumeier*
 26 rule.

27 ³ If “the interest of each State in enforcement of its law is roughly equal,” which “is implicit in the
 28 second and third *Neumeier* rules,” the place of the tort is considered a “tie breaker” and the law of
 that State applies. *Id.*

Even if the local law of the respective party's domiciliary does benefit that party, New York law still would apply under the third *Neumeier* rule because Plaintiffs cannot establish that application of California law would advance "the relevant substantive law purposes without impairing the smooth working of the multistate system or producing great uncertainty for litigants." *Cooney*, 612 N.E.2d at 281. Here, application of California law risks frustrating New York's demonstrated interest in governing the conduct of transportation network companies ("TNCs") and drivers. New York has demonstrated a clear legislative interest in the operations of TNC services within its borders, and the conduct of drivers accessing TNC digital networks. *See, e.g.*, N.Y. Veh. & Traf. L. § 1699 (re: TNC driver background checks); *id.* § 1696(2) (re: TNC driver substance use); *id.* § 1692(2) (re: TNC licensing); *see also* S.B. 4159, 240th Sess. (N.Y. 2017) (stating act's purpose to "ensure the safety, reliability, and cost-effectiveness" of TNC services and "preserve and enhance access to these important transportation options" in New York). Application of California law also would create uncertainty for TNCs operating in New York in compliance with New York law and yet face the risk of facing liability for allegedly running afoul of California law that may apply to the same conduct. *See Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 492-93 (S.D.N.Y. 2001); *Amusement Indus., Inc. v. Stern*, 693 F. Supp. 2d 327, 340-41 (S.D.N.Y. 2010). New York also has an interest in applying its laws to claims asserted by its own domiciliaries who allege they were injured as a result of the negligence of another. *O'Conner v. U.S. Fencing Ass'n*, 260 F. Supp. 2d 545, 557 (S.D.N.Y. 2003).

20 B. California Conflicts of Law Principles Mandate Application of New York Law

21 New York law also applies under California's "governmental interest test," which provides
 22 that if the laws of the competing states differ, the court "must determine what interest, if any, the
 23 competing jurisdictions have in their application of their respective laws." *Cooper v. Tokyo Elec.*
 24 *Power Co. Holding, Inc.*, 960 F.3d 549, 559 (9th Cir. 2020). If more than one jurisdiction has such
 25 an interest, the court then must apply "the law of the state whose interest would be the more
 26 impaired if its law were not applied." *Id.*

27 A state generally has legitimate interests in having its laws applied in cases concerning
 28 incidents that occurred in that jurisdiction. *Id.* at 560. Here, New York's extensive regulation of

1 the TNC industry, including with respect to driver criteria and safety standards, demonstrates a
 2 clear interest in the operations of TNCs like Uber within the state's borders. *See, e.g.*, N.Y. Veh.
 3 & Traf. L. § 1699; *id.* § 1696(2); *id.* § 1692(2); *see also* S.B. 4159, 240th Sess. (N.Y. 2017).
 4 California, by contrast, has little legitimate interest in applying its laws to cases involving foreign
 5 residents and incidents outside of its borders, *Morris v. AGFA Corp.*, 144 Cal. App. 4th 1452,
 6 1467 (2006), or in compensating non-resident plaintiffs for related injuries, *see Chen v. L.A. Truck*
 7 *Ctrs., LLC*, 42 Cal. App. 5th 488, 498 (2019); *Kasel v. Remington Arms Co.*, 24 Cal. App. 3d 711,
 8 734 (1972).

9 Even if this Court were to find that California had some “legitimate interest” in the
 10 application of its laws to an injury to a non-resident outside California, New York law would still
 11 apply where the injured plaintiff does not reside in California. “California courts have tended to
 12 apply the law of the place of the injured’s domicile, finding that the state has the greatest interest
 13 in compensating its domiciliaries.” *Kasel*, 24 Cal. App. 3d at 734.⁴

14 C. New York Law Applies Under the Terms of Use of 6 New York Plaintiffs

15 New York law clearly applies to the 6 New York Plaintiffs who agreed to Uber’s Terms of
 16 Use in effect in January 2021 or later. Declaration of Peter Sauerwein (“Sauerwein Decl.”) ¶¶ 5,
 17 9, Ex. A (emphasis added). Since at least 2021, the Terms of Use have specified that:

18 Any dispute, claim, or controversy arising out of or relating to
 19 incidents . . . resulting in personal injury (including but not limited
 20 to sexual assault or harassment claims) . . . shall be governed by
 21 **and construed in accordance with the laws of the state in which
 22 the incident . . . occurred.**

23 Sauerwein Decl. Ex. C (emphasis added).

24 Such clauses are enforced as written where “(1) the chosen state has a substantial
 25 relationship to the parties or their transaction, or (2) whether there is any other reasonable basis
 26 for the parties’ choice of law.” *Simulados Software, Ltd. v. Photon Infotech Priv., Ltd.*, 40 F. Supp.
 27 3d 1191, 1197 (N.D. Cal. 2014) (quotations omitted). The only exception is when the chosen law

28 ⁴ That Uber maintains one of its headquarters in California does not create an interest by the state
 29 in cases involving alleged tortious conduct by non-resident independent drivers against non-
 30 resident riders. Cf. Order on Defendants’ Motions to Stay or Dismiss Based on *Forum Non*
Conveniens, *In re Uber Rideshare Cases*, No. CJC-21-005188 at 10 & n.11 (Super. Ct. S.F. Cnty.
 Jan. 23, 2023).

1 is “so offensive to California public policy as to be prejudicial to recognized standards of morality
 2 and to the general interests of the citizens.” *Applied Hydrogel Tech., Inc. v. Raymedica, Inc.*, 2007
 3 WL 951297, at *2 (S.D. Cal. Mar. 2, 2007) (quoting *Bassidji v. Goe*, 413 F.3d 928, 933 (9th Cir.
 4 2005)). That is not the case here. Moreover, any interest California may have in applying its laws
 5 is reduced where the alleged injury occurred outside of California. *See McCann v. Foster Wheeler*
 6 *LLC*, 48 Cal. 4th 68, 99 (2010) (applying Oklahoma law in action against New York defendant by
 7 California resident exposed to asbestos in Oklahoma); *see also Castro v. Budget Rent-A-Car Sys.*,
 8 *Inc.*, 154 Cal. App. 4th 1162, 1182 (2007).

9 **II. THE CLAIM FOR VICARIOUS LIABILITY FAILS AS A MATTER OF LAW**

10 Plaintiffs’ vicarious liability claims must be dismissed because Uber cannot, as a matter of
 11 law, be held vicariously liable for the sexual assaults and harassment allegedly committed by the
 12 independent drivers. New York’s long-settled authority regarding the scope of employment for
 13 the purposes of vicarious liability precludes Plaintiffs’ claims: “[W]here an employee’s actions
 14 are taken for wholly personal reasons, which are not job related, the challenged conduct cannot be
 15 said to fall within the scope of employment.” *Browne v. Lyft, Inc.*, 194 N.Y.S.3d 85, 88 (N.Y. App.
 16 Div. 2023) (citation omitted); *see also Phillips v. Uber Techs., Inc.*, 2017 WL 2782036, at *5
 17 (S.D.N.Y. June 14, 2017). Here, even assuming that the drivers are Uber employees -- they are
 18 not -- their alleged tortious conduct is still far outside the scope of their purported apparent agency
 19 “to provide transportation services.” Compl. ¶ 429.

20 For the same reasons, Uber also cannot be liable under the traditional “scope of
 21 employment” test, Uber also cannot be liable under a theory of apparent agency. And Plaintiffs
 22 fail to state a claim for vicarious liability based on alternative theories of liability -- i.e., ratification
 23 and the California Public Utilities Code § 5354.

24 **A. The Alleged Assaults Are Outside the Scope of Any Alleged Agency**

25 All of Plaintiffs’ vicarious liability claims -- regardless of alleged incident date -- are
 26 barred by New York common law. The Complaint effectively concedes that independent drivers
 27 are not Uber employees under New York law. *See* Compl. ¶ 419 (excluding New York from
 28

1 vicarious liability claim based on employment status).⁵ Nevertheless, Plaintiffs attempt to impose
 2 vicarious liability on Uber through a theory of apparent agency. *Id.* ¶ 428. But even if the drivers
 3 were Uber’s “apparent agents” - - they are not - - Plaintiffs’ vicarious liability claim still fails
 4 because under an apparent agency theory of vicarious liability, “[t]he rules . . . stating what acts
 5 are within the scope of employment, apply,” meaning that “a purported master ordinarily is not
 6 liable for conduct of an apparent servant not actuated in some measure by an intent to perform the
 7 service in which he is apparently engaged.” Restatement (Second) of Agency § 267 cmt. b.

8 New York law regarding the scope of employment in the context of vicarious liability
 9 claims precludes Plaintiffs’ “apparent agency” claim. As the New York Court of Appeals - - the
 10 state’s highest court - - has held multiple times, an employer cannot be vicariously liable for torts
 11 committed by an employee unless the conduct falls within the scope of employment - - *i.e.*, the
 12 conduct is part of the employer’s business and part of the employee’s job responsibilities. *Rivera*
 13 v. *New York*, 142 N.E.3d 641, 644-45 (N.Y. 2019). Courts applying New York law therefore
 14 routinely dispose of vicarious liability claims against employers based on sexual assaults allegedly
 15 committed by their employees as a matter of law, because those assaults were not committed within
 16 the scope of employment.⁶ That is because “an employer ‘is not liable for torts committed by the
 17 employee for personal motives unrelated to the furtherance of the employer’s business.’” *Swarna*
 18 v. *Al-Awadi*, 622 F.3d 123, 144 (2d Cir. 2010).

19 Here, the vicarious liability claims fail because Plaintiffs cannot plead facts that would
 20 support the conclusion that the drivers’ deplorable behavior (if proven) is within the scope of any

21 ⁵ Indeed, New York courts have held that Uber is not vicariously liable for the acts of independent
 22 drivers because they are independent contractors, not employees. *Duncan v. Uber Techs., Inc.*,
 23 2023 WL 7198189, at *1 (N.Y. Sup. Ct. Sept. 27, 2023); *Shenouda v. Rivas*, No. 601854/2020,
 24 slip op. at 2-3 (N.Y. Sup. Ct. Jan. 5, 2024); *Cortese v. Aman*, No. 605477/2019, slip op. at 2 (N.Y.
 25 Sup. Ct. Feb. 19, 2021).

26 ⁶ See, e.g., *N.X. v. Cabrini Med. Ctr.*, 765 N.E.2d 844, 846-47 (N.Y. 2002); *Berardi v. Niagara*
 27 *Cnty.*, 47 N.Y.S.3d 544, 546 (N.Y. App. Div. 2017); *Mayo v. N.Y.C. Transit Auth.*, 3 N.Y.S.3d 36,
 28 37 (N.Y. App. Div. 2015); *Doe v. Alsaad*, 12 F. Supp. 3d 674, 677 (S.D.N.Y. 2014); *Doe I v. Bd.*
of Educ. of Greenpoint Union Free Sch. Dist., 955 N.Y.S.2d 600, 602-03 (N.Y. App. Div. 2012);
Kunz v. New Netherlands Routes, Inc., 882 N.Y.S.2d 565, 567 (N.Y. App. Div. 2009); *Paul J.H.*
v. Lum, 736 N.Y.S.2d 561, 562 (N.Y. App. Div. 2002); *Koran I. v. N.Y.C. Bd. of Educ.*, 683
 N.Y.S.2d 228, 229-30 (N.Y. App. Div. 1998); *Heindel v. Bowery Sav. Bank*, 525 N.Y.S.2d 428,
 428-29 (N.Y. App. Div. 1988); *Wilson v. Danka Corp.*, 2002 WL 31929120, at *4-5 (S.D.N.Y.
 Jan. 28, 2003).

1 alleged agency. *Rivera*, 142 N.E.3d at 644-45. Importantly, the New York Court of Appeals has
 2 held that even where a tortfeasor's employment brings the tortfeasor in contact with the victim - -
 3 like drivers and riders using the Uber App - - that is not enough to state a vicarious liability claim.
 4 *Rivera*, 142 N.E.3d at 645-46 (dismissing vicarious liability claim against state for alleged assault
 5 by prison officer, even where "officers were on duty and the assault occurred at the prison while
 6 [the tortfeasor] supervised inmates in the mess hall").

7 The decisions in *Browne* and *Phillips* are directly on point. In *Browne*, the conduct of a
 8 driver using the Lyft App who picked up a minor and began masturbating in the vehicle was found
 9 to have been "a departure from his duties as a Lyft driver and was committed solely for personal
 10 motives unrelated to Lyft's business." 194 N.Y.S. at 88; *see id.* ("A sexual assault perpetrated by
 11 an employee is not in furtherance of an employer's business and is a clear departure from the scope
 12 of employment, having been committed for wholly personal motives." (citation omitted)). In
 13 *Phillips*, a driver using the Uber App committed assault, battery, and false imprisonment, but
 14 because those "are not acts 'commonly done' by taxi drivers, depart heavily from methods of
 15 normal performance, and could not have been reasonably anticipated by Uber," the court granted
 16 Uber's motion to dismiss the vicarious liability claim. 2017 WL 2782036, at *6. Here too, the
 17 independent drivers' "duties" were to pick up and transport passengers "from place to place," not
 18 to commit any form of assault. Compl. ¶ 388.

19 Consistent with the New York courts' rejection of vicarious liability premised on sexual
 20 assault committed by an employee, *Swarna*, 622 F.3d at 144 (2d Cir. 2010), courts in numerous
 21 other jurisdictions have dismissed similar vicarious liability claims against Uber and other TNCs.⁷
 22 As a recent example, the California Superior Court overseeing the Judicial Council Coordination
 23 Proceedings ("JCCP") dismissed all claims for vicarious liability with prejudice on the basis that
 24 Uber "cannot be held vicariously liable for the alleged sexual assaults committed by its drivers

25 ⁷ See, e.g., *Burmakova v. Uber Techs.*, No. 20STCV24517 (Super. Ct., Los Angeles Cnty., Oct.
 26 22, 2021); *Doe v. Uber Techs., Inc.*, No. 19-cv-03310-JSC, LEXIS 203466 (N.D. Cal. Nov. 22,
 27 2019); *Karlen v. Uber Techs., Inc., et al.* No. 3:21-cv-835 (U.S. Dist. Ct. Conn. August 27, 2022);
 28 *Doe v. Lyft*, 176 N.E.3d 863 (Ill. App. Ct. 2020); *Murray v. Uber Techs., Inc.*, No. 20-11250-NMG
 (D. Mass. Sept. 11, 2020); *C.T. v. Tetteh*, MRS-L-1723-23 (Super. Ct., Morris Cnty., Feb. 8, 2024);
Cortese v. Aman, No. 605477/2019 (N.Y. Sup. Ct. Feb. 19, 2021); *Coughlin v. Uber Techs., Inc., et al.*, No. 200203083 (Ct. of Common Pleas, Phil. Cnty., June 12, 2020).

1 because such conduct falls outside the scope of employment.” *In Re: Uber Rideshare Cases*, CJC-
 2 21-005188, at 4 (Super. Ct. S.F. Cnty. June 22, 2023) (“JCCP Demurrer Order”), Atkins Decl.
 3 Ex. 4. In so doing, the court held that the plaintiffs failed to allege that the drivers were acting for
 4 purposes other than “personal gratification” or that their “sexual assaults were engendered by their
 5 alleged employment,” as opposed to being motivated by the drivers’ “close proximity to
 6 passengers[] in a confined environment.” *Id.* at 6. The JCCP ruling conformed with other rulings
 7 across the nation.

8 **B. Plaintiffs’ Ratification Theory Fails**

9 Plaintiffs fail to plead facts that would establish that Uber is vicariously liable for the
 10 alleged misconduct of the accused drivers under a theory of ratification. Compl. ¶¶ 436-39.
 11 “Ratification is the express or implied adoption of acts of another by one for whom the other
 12 assumes to be acting but without authority,” and “only occurs where the principal has full
 13 knowledge of all material facts and takes some action to affirm the agent’s actions.” *Prisco v.*
 14 *New York*, 804 F. Supp. 518, 523 (S.D.N.Y. 1992) (emphasis added).

15 Plaintiffs allege that Uber ratified the independent drivers’ alleged assaults because it was,
 16 as a general matter, “aware of the scope and scale of sexual assaults.” Compl. ¶ 437. That
 17 misapprehends what ratification is. Ratification requires “full knowledge of all material facts” of
 18 a specific agent’s specific alleged misconduct. *Prisco*, 804 F. Supp. at 523; *A. Terzi Prods., Inc.*
 19 v. *Theatrical Protective Union*, 2 F. Supp. 2d 485, 492 (S.D.N.Y. 1998) (Sotomayor, J.)
 20 (explaining that “ratification of another’s actions requires ‘full knowledge [of] . . . the specific acts
 21 in question,’” and dismissing claims where plaintiffs failed to adequately allege such knowledge).
 22 No such specific knowledge is alleged here.

23 Moreover, the Complaint does not allege that Uber adopted or confirmed what any specific
 24 driver allegedly did to any specific Plaintiff. Instead, Plaintiffs allege that Uber “failed to respond
 25 adequately to reports of sexual misconduct, failed to adequately investigate reports of sexual
 26 misconduct, failed to report sexual misconduct to law enforcement, and reinstated drivers after
 27 complaints of misconduct.” Compl. ¶¶ 437-38. But ratification requires factual allegations
 28 showing that the defendant affirmatively adopted or affirmed the specific conduct of a specific

1 individual - - *i.e.*, the defendant is responsible for an agent's conduct if the defendant approved
 2 that specific conduct. *See Hale v. Teledoc Health, Inc.*, 2021 WL 1163925, at *6 (S.D.N.Y. Mar.
 3 25, 2021) (“Nowhere do plaintiffs allege an ‘objectively or externally observable indication’ that
 4 [the defendant] ‘exercised choice and [] consented to the acts of [defendant’s alleged agent].’”).
 5 Plaintiffs here are attempting to base their theory of ratification on what is essentially a negligence
 6 claim - - that Uber failed to take the appropriate actions to “redress the issue” of alleged sexual
 7 assault by drivers. Compl. ¶ 437. But that is not enough to plead that Uber affirmatively adopted
 8 any driver’s conduct. *Hale*, 2021 WL 1163925, at *5.

9 C. CPUC § 5354 Does Not Create Vicarious Liability

10 Plaintiffs allege that Uber is vicariously liable for conduct by independent drivers by virtue
 11 of a California Public Utilities Commission regulation that provides:

12 In construing and enforcing the provisions of this chapter *relating*
 13 *to the prescribed privileges and obligations of the holder of a*
 14 *permit or certificate issued hereunder*, the act, omission, or failure
 15 of any officer, agent, or employee, or person offering to afford the
 16 authorized service with the approval or consent of the permit or
 17 certificate holder, is the act, omission, or failure of the permit or
 18 certificate holder.

19 Cal. Pub. Util. Code (“CPUC”) § 5354 (emphasis added); *see* Compl. ¶¶ 440-44. But section 5354
 20 does not impose vicarious liability on Uber for incidents that occurred in New York because it
 21 applies only to TNCs “operating in California.” *Id.* § 5431(c) (emphasis added). Applying this
 22 regulation here would conflict with New York’s own regulations governing TNCs. N.Y. Veh. &
 23 Traf. L. § 1691 *et seq.*

24 Even if the CPUC did govern claims based on Uber’s operations in Texas, it still would
 25 not create vicarious liability for conduct by independent drivers. The first clause of section 5354
 26 limits its application to “construing and enforcing the provisions” of the CPUC chapter governing
 27 “Charter-Party Carriers of Passengers,” including TNCs. *Id.* § 5354. It does not impose on TNCs
 28 tort liability for *any* “act, omission, or failure” by a driver, much less vicarious tort liability.

1 **III. PLAINTIFFS' FRAUD-RELATED CLAIMS SHOULD BE DISMISSED**

2 Under New York law, the elements of an intentional misrepresentation or fraud claim are:

3 “(1) a material misrepresentation or omission of fact, (2) made with knowledge of its falsity, (3)

4 with intent to defraud, and (4) reasonable reliance on the part of the plaintiff, (5) that causes

5 damage to the plaintiff.” *Wargo v. Hillshire Brands Co.*, 599 F. Supp. 3d 164, 177 (S.D.N.Y.

6 2022).⁸ Such claims also must satisfy the heightened pleading standard of Rule 9(b) by “stat[ing]

7 with particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b). That requires

8 pleading with specificity “an account of the time, place, and specific content of the false

9 representations as well as the identities of the parties to the misrepresentations.” *Swartz v. KPMG*

10 *LLP*, 476 F.3d 756, 764 (9th Cir. 2007) (quotations omitted); *see also Vess v. Ciba-Geigy Corp.*

11 *USA*, 317 F.3d 1097, 1103-04 (9th Cir. 2003); *Cohen v. S.A.C. Trading Corp.*, 711 F.3d 353, 359

12 (2d Cir. 2013).

13 Here, by definition, the Complaint cannot satisfy Rule 9(b) because it does not allege any

14 facts specific to any Plaintiff. While the Complaint describes an assortment of alleged

15 misstatements by Uber over a broad period of time, it does not allege (a) which specific Plaintiff,

16 (b) saw which specific statement, (c) where or when she specifically saw it, (d) how that specific

17 Plaintiff actually and justifiably relied on the specific statement, or (e) how that specific Plaintiff

18 was damaged as a result. That this is an MDL does not relieve Plaintiffs of having to plead with

19 specificity, nor does it dilute the requirements of Rule 9(b). In an MDL, “to satisfy the

20 requirements of Rule 9(b), plaintiffs must ‘inject precision and some sort of substantiation into

21 their allegations of fraud.’” *In re Ford Motor Co. Ignition Switch Prod. Liab. Litig.*, 2001 WL

22 1266317, at *7 (D.N.J. Sept. 30, 1997) (citation omitted); *see also JCCP Demurrer Order*, at 12-

23 15.

24

25

26

27 ⁸ To the extent Plaintiffs assert a claim for negligent misrepresentation, the elements largely

28 overlap with the elements of intentional misrepresentation, *see Amusement Indus., Inc. v. Stern*,

29 786 F. Supp. 2d 758, 778 (S.D.N.Y. 2011), and the claim fails for the same reasons as their

30 intentional misrepresentation claims.

1 **A. The Complaint Fails to Plead Reliance**

2 To withstand dismissal of a fraud claim under New York law, each plaintiff must allege
 3 with specificity “actual reliance” on a specific misrepresentation or omission. *Ramiro Aviles v.*
 4 *S&P Global, Inc.*, 380 F. Supp.3d 221, 283 (S.D.N.Y. 2019). To establish actual reliance, “each
 5 individual Plaintiff must demonstrate that the misrepresentation or omission was a ‘substantial
 6 factor in inducing [him or her] to act the way that [he or she] did.’” *Ge Dandong v. Pinnacle*
 7 *Performance Ltd.*, 2013 WL 5658790, at *9 (S.D.N.Y. Oct. 17, 2013) (alteration in original).
 8 Reliance is thus highly individualized and specific to each plaintiff and “therefore, generally
 9 alleging reliance is insufficient.” *See JCCP Demurrer Order*, at 13. For the misrepresentation
 10 claims to survive, the Complaint must allege - - but does not allege - - specific facts, based on each
 11 Plaintiff’s specific individual experiences, supporting that each saw or heard specific
 12 representations by Uber, and that those specific representations induced her to arrange a ride
 13 through the Uber App or enter a vehicle arranged through the Uber App.

14 The *In re Ford Motor Co. Ignition Switch Prods. Liab. Lit.* MDL is instructive. That MDL
 15 involved over 100 plaintiffs alleging that defendant Ford “fraudulently misinform[ed] the public”
 16 regarding ignition switches. 2001 WL 1266317, at *6. Though plaintiffs “described with some
 17 particularity the nature of Ford’s alleged misrepresentations to the public and the mediums through
 18 which these statements were made,” the court found that the complaint was “nonetheless deficient
 19 in that it fail[ed] to describe with any particularity how plaintiffs relied upon the alleged
 20 misrepresentations and omissions of defendant, or how such reliance resulted in damages.” *Id.* at
 21 *7-8. Just like the Complaint here, the complaint “fail[ed] to state what advertisement or other
 22 statement by Ford was heard or seen and then relied upon by each . . . plaintiff.” *Id.* at *8.
 23 Although the Complaint lists an assortment of “examples” of alleged representations by Uber,
 24 Compl. ¶ 188, it does not allege particularized facts indicating which specific Plaintiff was aware
 25 of and saw which specific representations, and which specific Plaintiff then relied upon those
 26 representations in choosing to use Uber’s services. “It is implausible, to state the obvious, that
 27 every one of [the] individual Plaintiffs actually saw and relied on each and every one of the
 28 statements and other representations.” *JCCP Demurrer Order*, at 14.

1 **B. Plaintiffs Fail to Identify the Alleged False Statements with Specificity**

2 The Complaint also fails to allege with specificity the what, when, where, and how of the
 3 alleged misrepresentations and to which specific Plaintiff a specific misrepresentation was made.
 4 *Vess*, 317 F. 3d at 1106; *Landesbank Baden-Wurttemberg v. Goldman, Sachs & Co.*, 821 F. Supp.
 5 2d 616, 621-22 (S.D.N.Y. 2011). That pleading defect would require dismissal even if there were
 6 only a single Plaintiff. *See, e.g., Small v. Lorillard Tobacco Co., Inc.*, 679 N.Y.S.2d 593, 600
 7 (N.Y. App. Div. 1999); *Ross v. Amrep Corp.*, 393 N.Y.S.2d 410, 413 (N.Y. App. Div. 1977);
 8 *Minzer v. Barga, et al.*, 2020 WL 2621710, at *6 (N.Y. Sup. Ct. May 22, 2020).⁹ But it is a major
 9 problem here because the Complaint alleges a menu of allegedly false statements, none of which
 10 is connected to any specific Plaintiff. Instead, Plaintiffs make only general allegations that Uber
 11 made representations to “Plaintiffs and the general public” and that “Uber made intentional
 12 misrepresentations of fact to all users of the Uber App.” Compl. ¶¶ 369-70. The plaintiffs in the
 13 JCCP attempted a similar approach, which the JCCP court rejected. *JCCP Demurrer Order*, at
 14 15. That Plaintiffs here attached alleged “[e]xamples of safety-based marketing” by Uber also
 15 does not change the result because these self-selected examples are still not tied to any specific
 16 Plaintiff, to any time, or to any place.

17 For example, in *In re Volkswagen Clean Diesel*, the complaint “detail[ed] specific
 18 advertisements and marketing materials,” but the court found that the named plaintiffs’ allegations
 19 “lack[ed] sufficient detail about the particular circumstances surrounding VW’s
 20 misrepresentations to Plaintiffs.” 349 F. Supp. 3d 881, 914 (N.D. Cal. 2018). In particular, many
 21 of the named plaintiffs failed to identify “the specifics of what was represented” and none
 22 identified when and where they saw the advertising. *Id.* at 915. The court found this dispositive,
 23 emphasizing that “such linking allegations are required to satisfy Rule 9(b).” *Id.* (collecting cases)
 24 (emphasis added). The Complaint here suffers from the same defect.

25 ⁹ *See Jane Doe v. Uber Techs., Inc.*, No. 801980/2022 (N.Y. Super. Ct. Dec. 7, 2022) (dismissing
 26 Deceptive Practices claim based on alleged sexual assault); *Rodriguez v. Uber Techs., Inc.*, No.
 27 2020-CA-1823, at *4-5 (Aug. 9, 2021) (Fla. 9th J. D. Cir. Ct. Osceola County Aug. 9, 2021)
 28 (dismissing misrepresentation and fraud claims because, among other reasons, plaintiff made only
 “bare allegations of fraudulent conduct” and did not “identify[] the time, place, and manner in
 which the conduct occurred”); *Estate of Stella Yeh v. Uber Techs., Inc.*, CGC-20-584408, at 4
 (Super Ct. S.F. County Aug. 6, 2021) (same).

1 **C. The McKnight Class Action Settlement Bars Many Misrepresentation Claims**

2 **1. The Complaint Tries to Evade the *McKnight* Settlement**

3 By force of the June 1, 2017 Settlement of the *McKnight v. Uber* class action, 14-cv-05615
 4 (N.D. Cal.), Plaintiffs here who were members of that class, and did not opt out, released Uber
 5 from “any claim arising out of or relating to [Uber’s] representations or omissions regarding [1]
 6 background checks, [2] safety, or [3] the Safe Rides Fee.” *McKnight* Am. Stip. of Settlement ¶
 7 31(a) (June 1, 2017) (the “Release”), Atkins Decl. Ex. 2.¹⁰ Still, the Complaint includes allegations
 8 that are almost identical to those in the complaint in *McKnight*. *McKnight* Complaint, Atkins Decl.
 9 Ex. 1.¹¹ For example:

- 10 • The *McKnight* Complaint alleged that Uber misrepresented that “Uber is committed to
 connecting you with the safest ride on road.” The Complaint here alleges that Uber falsely
 advertised “the safest ride on the road.” *McKnight* Compl. ¶ 26; Compl. ¶¶ 20, 206, 207.
- 11 • The *McKnight* Complaint alleged that Uber misrepresented that it set “the strictest safety
 standards possible.” The Complaint here alleges that Uber misrepresented that it set “the
 strictest standards possible.” *McKnight* Compl. ¶ 26; Compl. ¶¶ 20, 207.
- 12 • The *McKnight* Complaint alleged that Uber misrepresented that drivers are “thoroughly
 screened through a rigorous process we’ve developed using industry-leading standards.”
 The Complaint here alleges that drivers are screened by “an industry-leading background
 check process.” *McKnight* Compl. ¶ 27; Compl. ¶¶ 20, 207.
- 13 • The *McKnight* Complaint alleged that safety standards “aim to go above and beyond local
 requirements.” The Complaint here alleges that Uber misrepresented that it “aims to go
 above and beyond local requirements” with “industry leading” background checks.
 McKnight Compl. ¶ 26; Compl. ¶ 20.

14 *McKnight* was settled pursuant to an Amended Stipulation of Settlement dated June 1,
 15 2017, which provided that all class members who did not opt out released claims “of any nature
 16 whatsoever, known or unknown, . . . which Plaintiffs and Class Members have or may have arising
 17 out of or relating to any allegations made in the Action, or any legal theories that could have been
 18 raised based on the allegations in the Action.” *McKnight* Am. Stip. of Settlement ¶ 31 (defining

19 ¹⁰ Where a defendant moves to dismiss a claim released by a prior settlement agreement, the Court
 20 may consider the settlement agreement because it is “integral to the plaintiff’s claims and its
 21 authenticity is not disputed.” *Lesnik v. Eisenmann SE*, 374 F. Supp. 3d 923, 936 (N.D. Cal. 2019).
 22 Uber respectfully requests that this Court take judicial notice of the *McKnight* Release, Complaint,
 23 and Mandate. *See* Atkins Decl. Exs. 1-3.

24 ¹¹ Plaintiffs cite the class action claims that culminated in the *McKnight* settlement. Compl. ¶ 208.

1 “Released Claims”). “The Released Claims include, but are not limited to, any claim arising out
 2 of or relating to [Uber’s] representations or omissions regarding background checks, safety, or the
 3 Safe Rides Fee.” *Id.*¹² In exchange for the Release, Uber agreed, among other things, that it would
 4 cease any use of anything called a “Safe Rides Fee” beyond early 2016. The Settlement Class
 5 included all passengers who “used the Uber App or website to obtain service from one of the Uber
 6 Ride Services With A Safe Rides Fee in the United States or its territories,” “from January 1, 2013
 7 to January 31, 2016,” and did not “elect exclusion or opt out from the Class.” *Id.* ¶¶ 6, 8.¹³
 8 Therefore, any Plaintiff here who was a class member already released Uber from “any claim
 9 arising out of or relating to [its] representations or omissions regarding background checks, safety,
 10 or the Safe Rides Fee.” *Id.* ¶ 31.

11 The Complaint’s total lack of specificity as to which Plaintiffs relied on which alleged
 12 misrepresentations and omissions, and when and where they did so, prevents Uber and the Court
 13 from determining which Plaintiffs are barred by the Release from pursuing which allegations about
 14 which alleged misrepresentations and omissions. Even so, it is clear that there are Plaintiffs in the
 15 class -- i.e., individuals who “from January 1, 2013 to January 31, 2016, used the Uber App or
 16 website to obtain service from one of the Uber Ride Services With A Safe Rides Fee in the United
 17 States or its territories.” *Id.* ¶ 6.¹⁴ Moreover, no claims relating to the “Safe Rides Fee” could
 18 have survived the *McKnight* settlement because that fee was terminated as part of the settlement
 19 and therefore did not exist after early 2016. The MDL cannot be used to avoid the enforcement of
 20 the *McKnight* settlement by lumping all the Plaintiffs together with no specifics. Put simply, either
 21

22 ¹² Final judgment in the *McKnight* action, following resolution of appeals, was entered by the
 23 Ninth Circuit on December 22, 2022. *McKnight* Mandate, Atkins Decl. Ex. 3. The release was
 24 effective on December 23, 2022. *McKnight* Am. Stip. of Settlement ¶ 16.

25 ¹³ The *McKnight* Release states that “Class Members are not releasing any claims for personal
 26 injuries.” *McKnight* Am. Stip. of Settlement ¶ 31. That exception immediately follows the release
 27 of “any claim arising out of or relating to Defendants’ representations or omissions regarding
 28 background checks, safety, or the Safe Rides Fee.” *Id.* Thus, the personal injury exception applies
 only where the claim relates to something other than an alleged representation or omission about
background checks, safety, or the Safe Rides Fee.

29 ¹⁴ Uber has identified 21 Plaintiffs who allege incidents in California, Florida, Illinois, New York,
 30 and Texas who released claims pursuant to the Release. Sauerwein Decl. ¶ 20. Uber is not aware
of any MDL Plaintiff who opted out of the *McKnight* class action settlement.

1 the Plaintiffs were part of the settlement and barred from alleging the released claims or the
 2 Plaintiffs otherwise were not charged a Safe Rides fee and cannot assert a claim based on the fee.

3 **2. The “Safe Rides Fee” Allegations Should Be Dismissed or Stricken**

4 There is at least one allegation that cannot stand and should be dismissed now with
 5 prejudice and/or stricken in light of the McKnight settlement: the allegation that the “Safe Rides
 6 Fee” constitutes an actionable misrepresentation or omission. Compl. ¶¶ 203-04. Under Rule
 7 12(f), the Court “may strike from a pleading an insufficient defense or any redundant, immaterial,
 8 impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f). As the Ninth Circuit has instructed,
 9 “‘immaterial’ matter is that which has no essential or important relationship to the claim for relief
 10 or the defenses being pleaded,” and “‘impertinent’ matter consists of statements that do not
 11 pertain, and are not necessary to the issues in question.” *Fantasy, Inc. v. Foberty*, 984 F.2d 1524,
 12 1527 (9th Cir. 1993), *rev’d on other grounds*, 510 U.S. 517 (1994).

13 Here, the allegations about the “Safe Rides Fee” being misleading are undeniably
 14 immaterial because they cannot, given the *McKnight* settlement, support any misrepresentation or
 15 omission claims. *First*, as to Plaintiffs who were members of the *McKnight* class, any claims
 16 arising from or relating to the Safe Rides Fee were released. *See supra* Section III.C.1. *Second*, it follows from the definition of the *McKnight* class that any Plaintiffs not in the class were those
 17 who did not obtain a “Uber Service With a Safe Rides Fee,” and therefore cannot claim to have
 18 been misled by the Safe Rides Fee. *Third*, as the use of the Safe Rides Fee was enjoined as part
 19 of the Settlement, no Plaintiff can have a claim based on a program that no longer existed after
 20 early 2016.

22 **D. The Complaint Alleges Representations That Are Not Actionable**

23 Although the Complaint includes a list of alleged misrepresentations, it does not plead facts
 24 showing that those statements are false, or in what way they are false. *See Harsco Corp. v. Segui*,
 25 91 F.3d 337, 347 (2d Cir. 1996) (complaint failed to satisfy Rule 9(b) where “[t]here is no
 26 explanation regarding why th[e] representation may be fraudulent”). The Complaint alleges, for
 27 example, that Uber made representations about the existence of “safety features built into every
 28 ride,” including that “911 help is a swipe away” and that RideCheck “can help detect if your trip

1 goes unusually off course.” Compl. ¶ 227, Appx. A, Ads 8, 28, 32; *see, also* Appx. A, Ads. 7, 9,
 2 10, 23, 24, 26, 27. The Complaint does not, however, allege that “safety features” are not built
 3 into every ride; that “911 help” is not a swipe (of the finger) away; or that the RideCheck feature
 4 does not “help detect” trips that go off course. Likewise, the Complaint points to Uber’s statements
 5 that drivers “must undergo a multi-step safety screen” and that Uber “rescreens drivers every year.”
 6 Compl. ¶ 215; *see also id.* ¶ 216, Appx. A, Ad. 30. Nowhere does the Complaint allege, however,
 7 facts showing that background checks are not used to vet drivers; that there is not a multi-step
 8 process; or that there are not background checks run every year. In short, the Complaint does not
 9 “sufficiently allege how the representation was false.” *Eternity Glob. Master Fund Ltd. v. Morgan*
 10 *Guar. Tr. Co. of N.Y.*, 2002 WL 31426310, at *7 (S.D.N.Y. Oct. 29, 2002).

11 What Plaintiffs do allege is that Uber should have different and additional safety features,
 12 and should use different background checks. *See* Compl. ¶ 365(a)-(p). But that belief does not
 13 render false Uber’s statements about the safety features it does, in fact, have, or about the
 14 background checks that are, in fact, conducted.

15 The Complaint also alleges statements that are not falsifiable, and thus are not actionable.
 16 A false representation must be one of an existing or past fact, and not a mere promise to do some
 17 act in the future. *Dragon Inv. Co. II LLC v. Shanahan*, 854 N.Y.S.2d 115, 117 (N.Y. App. Div.
 18 2008); *N.Y. Fruit Auction Corp. v. City of New York*, 439 N.Y.S.2d 648, 652 (N.Y. App. Div.
 19 1981). Accordingly, statements of opinion or puffery are not actionable. *Ironwoods Troy, LLC v.*
 20 *OptiGolf Troy, LLC*, 166 N.Y.S.3d 730, 734 (N.Y. App. Div. 2022). In *XYZ Two Way Radio Serv., Inc. v. Uber Technologies, Inc.*, the Eastern District of New York addressed false advertising
 21 claims against Uber based on its alleged safety representations. 214 F. Supp. 3d 179, 184
 22 (E.D.N.Y. 2016). The court held that Uber’s statements constituted non-actionable “puffery”
 23 because, although they were “intended to convey the impression that Uber takes the safety of its
 24 passengers seriously,” they were “boastful and self-congratulatory” and “couched in aspirational
 25 terms—‘committed to,’ ‘aim to,’ ‘believe deeply’—that cannot be proven true or false.” *Id.*

26 The Complaint alleges numerous similar non-actionable statements by Uber, including:
 27 “Through our joint efforts with cities and safety experts and by working together, we’re helping

1 to create safe journeys for everyone;” “That’s why we’re committed to safety—from the creation
 2 of new standards to the development of technology with the aim of reducing incidents;” and “Uber
 3 is dedicated to keeping people safe on the road.” Compl. ¶¶ 211, 221; *see also id.* Appx A, Ad. 6.
 4 These are not statements concerning past or existing material facts. *Dragon Inv.*, 854 N.Y.S.2d at
 5 117; *N.Y. Fruit*, 439 N.Y.S.2d at 652. They are expressions of company pride and esteem,
 6 communicated in aspirational language that would not reasonably be understood to be subject to
 7 factual verification. And they refer to “safety” in vague and general terms, without promising any
 8 specific standard of safety or guaranteeing absolute safety. *See Lee v. Mikimoto (Am.) Co.*, 2023
 9 WL 2711825, at *5 (S.D.N.Y. Mar. 30, 2023) (“General statements about compliance with safety
 10 and quality standards are non-actionable ‘puffery’ where, as here, they fail to identify specific
 11 requirements or standards.” (citation omitted)).

12 **E. The Complaint Fails to Adequately Plead Fraud by Omission**

13 Plaintiffs allege that Uber is liable for “misrepresentation by omission.” Compl. ¶ 368.
 14 The elements of a fraudulent omission claim are: (1) failure to disclose material information that
 15 defendant had a duty to disclose, (2) intention to defraud the plaintiff thereby, (3) reasonable
 16 reliance on the omission, and (4) damages. *Bermuda Container Line Ltd. v. Int'l Longshoremen's*
 17 *Ass'n, AFL-CIO*, 192 F.3d 250, 258 (2d Cir. 1999). Such claims also are subject to Rule 9(b).
 18 *Volkswagen*, 349 F. Supp. 3d at 915; *Quintana v. B. Braun Medical Inc.*, 2018 WL 3559091, at *7
 19 (S.D.N.Y. 2018). This claim should be dismissed for the following reasons.

20 First, Plaintiffs do not allege an omission of a “material fact.” Instead, as discussed above,
 21 they state a number of accusations and opinions about the company: Uber “failed to disclose the
 22 truth that Uber prioritized growth and driver supply over passenger safety”; Uber “failed to
 23 disclose the truth that Uber failed to adequately protect passengers against sexual assault or
 24 harassment committed by drivers”; and Uber did not disclose “the truth of its priorities and lack
 25 of adequate safety mechanisms.” Compl. ¶¶ 372-74. These are not allegations of undisclosed
 26 material facts, but derogatory characterizations of Uber. The Complaint therefore fails to allege
 27 an omission or concealment with the factual specificity required by Rule 9(b).

1 Second, Plaintiffs fail to allege that Uber had a duty to disclose. Such a duty arises only in
 2 three circumstances: “(1) where the parties stand in a confidential fiduciary relationship, (2) where
 3 one party possesses superior knowledge, not readily available to the other, and knows that the other
 4 is acting on the basis of mistaken knowledge, or (3) where a party to a business transaction has
 5 made a partial or ambiguous statement, on the theory that once a party has undertaken to mention
 6 a relevant fact to the other party it cannot give only half of the truth.” *Ellington Credit Fund, Ltd.*
 7 v. *Select Portfolio Serv., Inc.*, 837 F. Supp. 2d 162, 201 (S.D.N.Y. 2011). Here, the Complaint
 8 does not allege that Uber had a fiduciary or confidential relationship with any of the Plaintiffs that
 9 would create a duty to disclose. It alleges only, in a vague and conclusory fashion, that Uber “had
 10 a *special* relationship with the passengers.” Compl. ¶¶ 374(a) (emphasis added); *Henneberry v.*
 11 *Sumitomo Corp. of Am.*, 415 F. Supp. 2d 423, 441-42 (S.D.N.Y. 2006) (conclusory allegation of
 12 “relationship of trust and confidence” is insufficient). But an ordinary “arms-length contractual
 13 relationship” like the one between Uber and Plaintiffs does not form the basis of a fiduciary or
 14 confidential relationship producing a duty to disclose. *In re Mid-Island Hosp., Inc.*, 276 F.3d 123,
 15 130 (2d Cir. 2002) (“[W]hen parties deal at arms length in a commercial transaction, no relation
 16 of confidence or trust sufficient to find the existence of a fiduciary relationship will arise absent
 17 extraordinary circumstances.” (citation omitted)).

18 Plaintiffs also fail to allege that Uber “possesses superior knowledge, not readily available”
 19 to Plaintiffs,” *Ellington Credit*, 837 F. Supp. 2d at 201, because the Complaint alleges otherwise.
 20 The Complaint alleges that it was in 2014 that Uber started receiving reports of sexual assault by
 21 drivers against riders. Compl. ¶ 258. It then cites a *New York Times* article from 2014 called
 22 “Uber’s System for Screening Drivers Draws Scrutiny,” which details public and government
 23 criticism over Uber’s driver screening process and the alleged rape of a passenger. *Id.* ¶ 145 n.19;
 24 *see also id.* ¶ 151 (discussing 2014 investigation into Uber’s driver screening); *id.* ¶ 260 n.60
 25 (citing 2014 *New York Times* article about rape of passenger). Also in 2014, the original Complaint
 26 in the *McKnight* class action was filed, which alleged that Uber made misleading statements about
 27 passenger safety because, among other things, a woman allegedly (it was never proven) was
 28

1 attacked by a driver with a criminal background. Atkins Decl. Ex. 1, *McKnight* Compl. ¶ 53 n.2.¹⁵
 2 As discussed above, numerous Plaintiffs *in this case* were actually class members in *McKnight*
 3 and received payment in exchange for releases. Those Plaintiffs certainly did not lack opportunity
 4 to discover information about Uber safety-related statements, including about background checks.
 5 See *Jana L. v. W. 129th St. Realty Corp.*, 802 N.Y.S.2d 132, 135 (N.Y. App. Div. 2005).

6 Then, as Plaintiffs themselves allege, in 2019 Uber released the 84-page 2017-2018 Safety
 7 Report detailing with statistical precision the number of incidents of the most severe forms of
 8 sexual misconduct on the platform. Compl. ¶ 273. Uber issued the Report even though it was not
 9 legally mandated to do so and even though doing so was above and beyond any industry standard
 10 (e.g., Lyft had not launched a report; there are also no notices or reports regarding sexual assaults
 11 on airplanes and cruises or at hotels, despite the fact that sexual assaults occur in those industries
 12 too). That directly contradicts Plaintiffs' accusation that Uber did not disclose facts about safety
 13 and, more generally, that Uber is the type of company that conceals such facts. Because these
 14 alleged safety issues were part of the public record, Plaintiffs' conclusory allegations of Uber's
 15 supposedly exclusive knowledge do not state a claim for fraud by non-disclosure. *Ellington Credit*
 16 *Fund*, 837 F. Supp. 2d at 201; *Am. Med. Distributors v. Macdonald Tuskey*, 2018 WL 1478301, at
 17 *3 (S.D.N.Y. Mar. 23, 2018).

18 Absent a confidential or fiduciary relationship, a duty may arise "on the theory that once a
 19 party has undertaken to mention a relevant fact to the other party it cannot give only half the truth."
 20 *Brass v. Am. Film Techs.*, 987 F.2d 142, 150 (2d Cir. 1993). Thus, whether a "partial
 21 representation" is misleading depends on the nature of the alleged "half-truth" and the
 22 circumstances in which it was materially incomplete. *Miller v. HSBC Bank U.S.A.*, N.A., 2015
 23 WL 585589, at *8 (S.D.N.Y. Feb. 11, 2015). The Complaint fails to allege any facts that support
 24 the conclusion that Uber failed to disclose new information that rendered prior disclosures untrue
 25 or that Uber made any fraudulent partial disclosure.¹⁶

26 ¹⁵ The same alleged incident is discussed in the original complaint filed in December 2014.
McKnight v. Uber Techs., Inc., 14-cv-05615, ECF No. 1, ¶ 36.

27 ¹⁶ For the reasons stated *supra* Section III.A, Plaintiffs fail to allege reliance as to each particular
 Plaintiff. In order to plead reliance under a fraudulent concealment theory, a plaintiff must allege
 28 that the withheld information "induced plaintiff to engage in the transaction in question."

1 **IV. THE CLAIM FOR NEGLIGENT INFILCTION OF EMOTIONAL DISTRESS**
 2 **CLAIM IS DUPLICATIVE**

3 Under New York law, a claim for negligent infliction of emotional distress (“NIED”),
 4 requires plaintiff to establish “(i) extreme and outrageous conduct; (ii) intent to cause, or disregard
 5 of a substantial probability of causing, severe emotional distress; (iii) a causal connection between
 6 the conduct and injury; and (iv) severe emotional distress.” *Howell v. N.Y. Post Co.*, 612 N.E.2d
 7 699, 702 (N.Y. 1993). However, an “NIED claim cannot be asserted if it is ‘essentially duplicative
 8 of tort or contract causes of action.’” *Doe v. Uber Techs. Inc.*, 551 F. Supp. 3d 341, 364 (S.D.N.Y.
 9 2021) (citation omitted). Here, any claim for NIED is duplicative of Plaintiffs negligence claims,
 10 which are based on the same factual circumstances and seek the same potential recovery. *Compare*
 11 Compl. at ¶¶ 362-67 (alleging Negligence), *with* Compl. at ¶¶ 381-85 (alleging NIED). Because
 12 the claim for NIED is duplicative of and subsumed by the negligence claims, it is ripe for dismissal
 13 on the pleadings as a matter of law. *Doe*, 551 F. Supp. 3d at 364.

14 **V. PLAINTIFFS FAIL TO ALLEGE NEGLIGENT ENTRUSTMENT**

15 To support a claim for negligent entrustment, Plaintiffs must allege facts establishing that
 16 the defendant has “some special knowledge concerning a characteristic or condition peculiar to
 17 the” person to whom a particular chattel is given which renders their use of the chattel
 18 “unreasonably dangerous.” *Moll v. Griffith*, 173 N.Y.S.3d 754, 756 (N.Y. App. Div. 2022).
 19 Contrary to Plaintiffs’ allegations, the Uber App and Uber’s trademarks are not “chattel.” *See*
 20 Compl. ¶ 363(n). Negligent entrustment claims in New York apply only to chattels that are
 21 moveable or transferable physical property, such as motor vehicles and firearms. *See Splawnik v.*
 22 *Di Caprio*, 540 N.Y.S.2d 615, 617 (N.Y. App. Div. 1989). In any event, even if the Uber App
 23 and/or its trademark were considered “chattel,” Plaintiffs do not allege that any independent
 24 driver’s negligent use of the Uber App or Uber’s trademarks, or that any such alleged negligent
 25 use caused any particular Plaintiff’s injury. Accordingly, the claim must be dismissed.

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Browne, 194 N.Y.S.3d at 89; *Laub*, 745 N.Y.S.2d at 536; *DoubleLine Capital LP v. Odebrecht*
 28 *Finance, Ltd.*, 323 F. Supp. 3d 393, 463 (S.D.N.Y. 2018); *see also Fyre Festival*, 399 F. Supp. 3d
 at 216-17.

1 **VI. THE COMPLAINT'S STRICT PRODUCT LIABILITY CLAIMS FAIL AS A**
 2 **MATTER OF LAW**

3 A manufacturer, distributor, or retailer of a product is liable in tort if a defect in the product
 4 causes injury while the product is being used in a reasonably foreseeable way. *Lugo by Lopez v.*
 5 *LJN Toys, Ltd.*, 552 N.E.2d 162, 163 (N.Y. 1990). As relevant here, defining whether there is a
 6 “product” at issue is a condition precedent to successfully maintain the action. *See State Farm*
 7 *Fire & Cas. Co. v. Weil-McLain*, 2019 WL 10374223, at *2 2019 N.Y. Slip Op. 34023 (N.Y. Sup.
 8 Ct. Aug. 20, 2019). Whether or not the subject object is defined as a “product” is a question of
 9 law for the court to decide. *In re Eighth Jud. Dist. Asbestos Litig.*, 129 N.E.3d 891, 896 (N.Y.
 10 2019). Here, the Complaint fails to allege facts sufficient to show the Uber App is a “product” or
 11 “tangible personal property distributed commercially for use or consumption.” Restatement
 12 (Third) of Torts: Prod. Liab. § 19. To the contrary, as the Complaint itself acknowledges, the Uber
 13 App provides a *service* of connecting riders with drivers. *See, e.g.*, Compl. ¶ 390 (“Uber charges
 14 standard fees for its services through its application.”); *id.* ¶ 391 (“Any member of the public can
 15 use Uber’s transportation services.”); *see also id.* ¶¶ 13, 70, 73, 119, 179, 206, 352, 388, 408, 421,
 16 429-30. Similarly, the New York Legislature recognizes that TNCs provide a service. *See, e.g.*,
 17 N.Y. Veh. & Traf. L. §§ 1691-1700 (referring to “Transportation Network Company Services”)
 18 (emphasis added); *id.* § 1691(2) (“[d]igital network’ means any *system or service* offered or
 19 utilized by a transportation network company(emphasis added)); *id.* at § 1691(4)(a)
 20 (“Transportation network company driver’ or ‘TNC driver’ means an individual who: receives
 21 connections to potential passengers and related *services*”); *see also id.* at § 1691(3).

22 “Services, even when provided commercially, are not products.” Restatement (Third) of
 23 Torts: Prod. Liab. § 19. Since software, like the Uber App, generally is designed to provide a
 24 service, “most software does not fall within the purview of product liability law.” Raymond T.
 25 Nimmer, Law of Comput. Tech. § 12:41 (Nov. 2023 Update); *see also* Michael D. Scott, *Scott on*
 26 *Info. Tech. Law*, § 15.08 n.105 (3d ed. 2024 Supp.); Michael L. Rustad & Thomas H. Koenig, *The*
 27 *Tort of Negligent Enablement of Cyberspace*, 20 Berkeley Tech. L.J. 1553, 1577 (2005). For these
 28 reasons, courts in many jurisdictions have found that the Uber App, and similar apps, are not

1 products.¹⁷ For example, in the JCCP, the court explained that “customers do not purchase the
 2 App, nor is it in any meaningful sense the object of their transaction with Uber, but merely the
 3 mechanism by which that object—securing a ride to their destination—is accomplished.” *JCCP*
 4 *Demurrer Order*, at 18. The court held “[t]he Uber App is no more a ‘product’ . . . than is a
 5 telephone that a customer uses to call a taxi.” *Id.*

6 Even if the Uber App could be viewed in some respect as a product under New York law
 7 (it is not), Plaintiffs would still need to establish that their transaction with Uber was for the
 8 purpose of purchasing a product rather than obtaining a service (connecting with an independent
 9 driver to obtain a ride). *Levine v. Sears Roebuck & Co.*, 200 F. Supp. 2d 180, 192 (E.D.N.Y.
 10 2002); *see also Detwiler v. Bristol-Myers Squibb Co.*, 884 F. Supp. 117, 121 (S.D.N.Y. 1995).
 11 Plaintiffs cannot make this showing because their transactions with Uber were to obtain the use of
 12 Uber’s “services” - - not to compensate Uber for the purchase of the App, which is free to
 13 download. *Detwiler*, 884 F. Supp. at 121.

14 Even setting aside the threshold issue of whether the Uber App is a product, the Complaint
 15 also fails to state a claim for strict product liability because it does not allege any defect or
 16 condition necessitating a warning. Nowhere does the Complaint allege that the App had a glitch
 17 or bug that impaired its ability to connect riders with drivers or that the Uber App had an inherent
 18 and dangerous design flaw that prevented it from performing its function of connecting riders with
 19 drivers.¹⁸ Likewise, the Complaint does not allege that the design of the Uber App itself, such as

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 21 ¹⁷ See, e.g., *Arruda v. Rasier, LLC*, No. A-23-878332-C (Dist. Ct., Clark County, Mar. 18, 2024);
 22 *Martinez v. Uber Techs., Inc.*, No. 23STCV09795 (Cal. Super. Ct., Oct. 3, 2023); *Ramos v. Uber*
 23 *Techs., Inc.*, No. 22STCV33007 (Cal. Super. Ct. June 1, 2023); *Luna, Avelardo v. Uber Techs., Inc.*, No. 22STCV10806 (Cal. Super. Ct., Sept. 27, 2022); *Baxter-Aremtrout v. Lyft, Inc.*, No. 50-
 24 20210CA-013917 (Fla. Cir. Ct., Aug. 29, 2022); *Behuet & Hunt v. Uber Techs., Inc.*, 2022 WL
 25 20318684, at *2 (Cal. Super. Ct. July 13, 2022); *Shannon v. Uber Techs., Inc.*, No. 21STCV42029
 26 (Cal. Super. Ct., Apr. 15, 2022); *Flores v. Uber Techs., Inc.*, No. 19STCV24988 (Cal. Super. Ct.,
 27 Mar. 22, 2022); *Norman v. Uber Techs., Inc.*, No. 21STCV35632 (Cal. Super. Ct. Mar. 8, 2022);
Cruz Lopez v. Uber Techs., Inc., No. 21CV376012 (Cal. Super. Ct. Dec. 7, 2021); *Polanco v. Lyft, Inc.*, 2021 Cal. Super. LEXIS 60679 (Cal. Super. Ct. May 13, 2021); *Toral v. Uber Techs., Inc.*, No. 20STCV02030 (Cal. Super. Ct. Apr. 14, 2021); *Jane Doe No. 1 v. Uber Techs., Inc.*, 2020 Cal. Super. LEXIS 73095 (Cal. Super. Ct. Nov. 30, 2020); *see also Ziencik v. Snap, Inc.*, 2023 WL 2638314, at *4 (C.D. Cal. Feb. 3, 2023) (same as to Snapchat); *Jackson v. Airbnb, Inc.*, 639 F. Supp. 3d 994, 1010-11 (C.D. Cal. 2022) (same as to Airbnb).

28 ¹⁸ Liability for defective design exists only where an allegedly defective product is “not reasonably safe” to the user. *See Voss v. Black & Decker Mfg. Co.*, 450 N.E.2d 204, 208 (N.Y. 1983).

1 its coding sequences that connect riders with drivers, is dangerous when used as intended and
 2 therefore requires warnings.¹⁹ Instead, Plaintiffs contend that Uber negligently failed to prevent
 3 the sexual misconduct of independent drivers because it implemented inadequate safety measures
 4 and background checks. Compl. ¶ 473. But Uber’s alleged “failure to permit passengers to select
 5 drivers of the same gender” on the Uber App (*id.* ¶ 473(b)), for example, is not a defect in the
 6 software’s function of connecting riders with drivers. Nor is Uber’s supposed failure to include a
 7 feature that would “ship dash cameras to drivers.” *Id.* ¶ 487(a). These are simply safety measures
 8 that Plaintiffs think Uber should take, but they do not go to the design of the software itself.

9 The strict product liability claims fail for the additional reason that the Complaint does not
 10 plausibly allege causation with respect to any individual Plaintiff. *See Voss*, 450 N.E.2d at 209;
 11 *see Oden v. Boston Scientific Corp.*, 330 F. Supp. 3d 877, 888 (E.D.N.Y. 2018). To survive
 12 dismissal, the Complaint must allege facts sufficient to show that the absence of a different design
 13 was the cause of each Plaintiff’s injury -- *i.e.*, that the sexual assaults would not have occurred or
 14 would have been reduced had Uber adopted a specific different design. *See, e.g., Zsa Zsa Jewels,*
 15 *Inc. v. BMW of N. Am., LLC*, 419 F. Supp.3d 490, 507 (E.D.N.Y. 2019). Here, none of the Plaintiffs
 16 has satisfied that pleading requirement because none of them has alleged facts to show what
 17 specific alternative design would have prevented what specific incident, or that an alternative
 18 design would have stopped the independent motivations of a criminal perpetrator. Plaintiffs’
 19 alleged injuries stemmed not from a software design flaw, but from the alleged actions of
 20 independent drivers who made independent decisions to commit sexual assault.

21 For example, the Complaint alleges that the Uber App failed to “utilize its existing GPS,
 22 alert, and predictive technology to implement a feature whereby safety alerts are triggered in the
 23 event of route deviations or excessive time spent with a passenger at the beginning or end of a
 24 route.” Compl. at ¶ 487(b). Yet, the Complaint does not allege, because it would be implausible,
 25 that the absence of such “predictive technology” was the but-for cause all 200+ alleged incidents.
 26 For instance, there are alleged incidents where there were no “route deviations,” but, rather, where

27 ¹⁹ A failure to warn claim must “allege[] that the product itself is unlawfully dangerous unless
 28 accompanied by sufficient warnings or instructions.” *Kurns v. R.R. Friction Prods. Corp.*, 565
 U.S. 625, 635 (2012).

1 the driver allegedly assaulted the rider *after* the ride was complete and *after* the Uber App had
 2 been turned off. Similarly, there is no allegation that each individual Plaintiff used the App herself
 3 to order the ride at issue, or would have seen any warning issued through the App or otherwise
 4 directed to App users. Absent well-pled, plaintiff-specific allegations that a warning would have
 5 been seen, and heeded, by any particular individual Plaintiff, the Complaint's failure to warn
 6 claims fail.

7 **VII. PLAINTIFF FAILS TO STATE A CLAIM FOR RELIEF UNDER THE UCL**

8 **A. Plaintiffs Cannot Assert UCL Claims for Incidents Occurring in New York**

9 Plaintiffs' claims under the California Unfair Competition Law, Cal. Bus. & Prof. Code §
 10 17200 ("UCL"), must be dismissed. *See Compl. at ¶¶ 506-13.* California courts have long held
 11 that there is a presumption against applying California statutes extraterritorially. *See Sullivan v.*
 12 *Oracle Corp.*, 51 Cal. 4th 1191, 1207 (2011). Those courts "ordinarily presume the Legislature
 13 did not intend the statutes of [California] to have force or operation beyond the boundaries of the
 14 state," absent clear statutory language to the contrary. *Norwest Mortg., Inc. v. Superior Ct.*, 72
 15 Cal. App. 4th 214, 222 (1999). The California Supreme Court has held that "the presumption
 16 against extraterritoriality applies to the UCL in full force" because "[n]either the language of the
 17 UCL nor its legislative history provides any basis for concluding" otherwise. *Sullivan*, 51 Cal. 4th
 18 at 1207; *see also Ice Cream Distrib. of Evansville, LLC v. Dreyer's Grand Ice Cream, Inc.*, 2010
 19 WL 3619884, *8 (N.D. Cal. Sept. 10, 2010), *aff'd*, 487 F. App'x 362 (9th Cir. 2012).

20 In assessing whether a foreign resident can avail herself of the UCL, the "critical" questions
 21 "are whether the injury occurred in California and whether the conduct of Defendants occurred in
 22 California." *Tidenberg v. Bidz.com, Inc.*, 2009 WL 605249, *3-4 (C.D. Cal. Mar. 4, 2009). Here,
 23 the Complaint contains no factual allegations supporting a conclusion that any of the New York
 24 Plaintiffs used the Uber App in California to book the rides during which the incidents
 25 occurred. Indeed, the Complaint contains no allegations about any of the New York Plaintiffs'

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1 “individual contacts with California.” *Id.* at *5. On the contrary, for all the New York Plaintiffs,
 2 the incidents, and Plaintiffs’ alleged injuries resulting from the incidents, occurred *in New York*.²⁰

3 **B. Plaintiffs Fail to State a UCL Claim on the Merits**

4 Plaintiffs’ allegation that Uber engaged in “unlawful,” “fraudulent,” and “unfair” business
 5 practices is insufficient to state a claim for violation of the UCL. Compl. ¶¶ 506–10.

6 *First*, Plaintiffs allege that “Uber’s conduct was unlawful because it violated Uber’s
 7 common law duties of care.” *Id.* ¶ 507. In other words, Plaintiffs attempt to satisfy the “unlawful”
 8 prong of their UCL claim by relying on allegations that Uber’s conduct was negligent. But
 9 “[c]ommon law claims such as negligence cannot form the basis of an unlawful prong claim under
 10 the UCL.” *Mendez v. Selene Fin. LP*, 2017 WL 1535085, at *6 (C.D. Cal. Apr. 27, 2017); *see also Shroyer v. New Cingular Wireless Servs., Inc.*, 622 F.3d 1035, 1044 (9th Cir. 2010).

12 *Second*, in support of their UCL claim, Plaintiffs allege that “Uber’s conduct was
 13 fraudulent because it was grounded in Uber’s representations that it would protect its passengers’
 14 safety.” Compl. ¶ 509. However, Plaintiffs’ claim under the “fraud” prong of the UCL fails for
 15 the same reasons as their common law fraud claims as the UCL is “governed by Rule 9(b)’s
 16 heightened pleading standard.” *Frenzel v. AliphCom*, 76 F. Supp. 3d 999, 1010 (N.D. Cal. 2014).

17 *Third*, Plaintiffs make the conclusory allegation that Uber’s “conduct was unfair because
 18 it was unscrupulous, contrary to public policy and presented a serious risk of harm to persons Uber
 19 was responsible for protecting.” Compl. ¶ 508. Plaintiffs do not allege, however, that Uber’s
 20 alleged conduct is “tethered to an[] underlying constitutional, statutory or regulatory provision, or
 21 that it threatens an incipient violation of an antitrust law, or violates the policy or spirit of an
 22 antitrust law.” *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1214 (9th Cir. 2020) (quotations
 23 omitted). Although Plaintiffs speciously claim that Uber’s conduct “was grounded in unfair
 24 competition because the company enjoys a competitive advantage by not adequately protecting its

25 ²⁰ Some courts have held that the UCL may apply extraterritorially to claims based on alleged
 26 misrepresentations that were developed in and disseminated from California. *E.g., Ehret v. Uber*
Techs., Inc., 68 F. Supp. 3d 1121, 1131–32 (N.D. Cal. 2014). However, those cases are
 27 distinguishable. *First*, here, there is no factual allegation of misconduct occurring in
 28 California. *Second*, the misconduct giving rise to Plaintiffs’ claims indisputably occurred outside
 of the state, in New York.

1 passengers,” Compl. ¶ 510, Plaintiffs do not allege any “proof of some actual or threatened impact
 2 on competition,” *Cel-Tech Comms., Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 544 (Cal. 1999),
 3 nor do Plaintiffs tie their allegations “to some legislatively declared policy,” *id.*; *see also In re 5-*
 4 *Hour Energy Mktg. & Sales Pracs. Litig.*, 2014 WL 5311272, at *26 (C.D. Cal. Sept. 4, 2014).

5 **VIII. PLAINTIFFS ARE NOT ENTITLED TO INJUNCTIVE RELIEF**

6 Plaintiffs’ request for injunctive relief under the UCL, Compl. ¶¶ 506–13, fails for at least
 7 two reasons. *First*, a “plaintiff seeking equitable relief under the UCL must demonstrate the
 8 inadequacy of a remedy at law.” *Rodriguez v. FCA US LLC*, 2023 WL 3150075, at *3 (C.D. Cal.
 9 Mar. 21, 2023); *cf. Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 844 (9th Cir. 2020). That is
 10 because the Court lacks equitable jurisdiction to grant the request for injunctive relief where there
 11 is an adequate remedy at law. *See Rodriguez*, 2023 WL 3150075, at *4 (failure to “plausibly
 12 alleg[e] [plaintiff] lacks an adequate remedy at law[] is . . . fatal to establishing th[e] court’s
 13 equitable jurisdiction”). But here, the Complaint is entirely devoid of *any* allegation, plausible or
 14 not, that Plaintiffs lack an adequate remedy at law. Instead, all of the allegations pled in support
 15 of Plaintiffs’ claims for injunctive relief under the UCL are duplicative of allegations pled in
 16 support of Plaintiffs’ non-equitable claims for negligence, fraud, and product liability, and
 17 pursuant to which Plaintiffs separately seek money damages. *See, e.g.*, Compl. ¶¶ 367, 380, 490;
 18 *see Huynh v. Quora Inc.*, 508 F. Supp. 3d 633, 662 (N.D. Cal. 2020) (“[Plaintiff] fails to allege or
 19 demonstrate that any remedy at law is inadequate, and in fact she even seeks a remedy at law
 20 through her negligence claim, which is based on the same alleged conduct as her equitable claim.”).

21 *Second*, the Complaint fails to allege facts establishing that any individual Plaintiff has
 22 standing to seek injunctive relief under the UCL.²¹ “Under Article III’s standing requirement, a
 23 plaintiff seeking injunctive relief bears the burden of showing ‘that *he* is under threat of suffering
 24 ‘injury in fact’ that is *concrete and particularized*; the threat must be *actual and imminent, not*
 25 *conjectural or hypothetical*; it must be fairly traceable to the challenged action of the defendant;
 26 and it must be likely that a favorable judicial decision will prevent or redress the injury.’” *Doe v.*

27 ²¹ Because Plaintiffs’ Article III standing to seek injunctive relief is governed by federal law, the
 28 law of the Ninth Circuit applies. *See In re Korean Air Lines Disaster*, 829 F.2d at 1175-76.

1 *Match.com*, 789 F. Supp. 2d 1197, 1199 (C.D. Cal. 2011) (emphasis added) (quoting *Summers v.*
 2 *Earth Island Inst.*, 555 U.S. 488, 493 (2009)); *Payne v. Off. of the Comm'r of Baseball*, 705 F.
 3 App'x 654, 655 (9th Cir. 2017). But, Plaintiffs do not allege that any one of them faces an “actual
 4 and imminent” or “immediate” threat of being subjected to future misconduct by an independent
 5 driver. Generalized allegations about the purported “widespread nature of sexual misconduct” by
 6 certain independent drivers, Compl. ¶ 354, do not suffice to allege a “real and immediate” threat
 7 of future harm to any individual plaintiff as required to establish standing. *See City of Los Angeles*
 8 *v. Lyons*, 461 U.S. 95, 111 (1983) For example, in *Lyons*, a plaintiff sought an injunction against
 9 the City of Los Angeles after being subjected to a traffic stop and an alleged unprovoked chokehold
 10 by the officers. Although the plaintiff alleged that “the police in Los Angeles routinely apply
 11 chokeholds in situations where they are not threatened by the use of deadly force,” the Supreme
 12 Court held that the plaintiff nonetheless failed to establish “a real and immediate threat” that he
 13 would be subjected to the same alleged harm in the future. *Id.* at 106, 110.

14 Similarly, in *Doe v. Match.com*, a plaintiff alleged that, through defendant’s online dating
 15 service, she met a serial sexual predator who forcibly raped her. 789 F. Supp. 2d at 1198. The
 16 plaintiff sought injunctive relief requiring defendant to institute screening procedures that she
 17 alleges would have prevented the rape. *Id.* at 1199. The district court held, however, that plaintiff
 18 lacked standing to seek such relief because she had failed to establish more than a “tenuous
 19 likelihood of future injury” to herself. *Id.* at 1200; *see also Ramsay v. Frontier, Inc.*, 2020 WL
 20 4557545, at *3, 16 (D. Colo. July 30, 2020), *report and recommendation adopted*, 2021 WL
 21 651021 (D. Colo. Feb. 19, 2021); *Pungitore v. Barbera*, 506 F. App'x 40, 41-42 (2d Cir. 2012).
 22 Dismissal of Plaintiffs’ claims for injunctive relief is required for similar reasons as *Lyons* and
 23 *Match.com*: Plaintiffs cannot plausibly allege, and have not alleged, that any of them face an
 24 almost certain risk of a similar incident occurring, even assuming they were to use Uber’s services
 25 in the future.²²

26 ²² Relying on the Ninth Circuit’s decision in *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956,
 27 969 (9th Cir. 2018), Plaintiffs allege they have standing because “[i]t is plausible that each Plaintiff
 28 will seek to use Uber’s product in the future and necessarily will rely on Uber’s obligations and
 representations regarding safety.” Compl. ¶ 350. But *Davidson* addressed standing in the context
 of false advertising claims seeking to enjoin future advertising. Here, Plaintiffs purport to seek an

IX. PLAINTIFFS' REQUEST FOR PUNITIVE DAMAGES SHOULD BE DISMISSED

Plaintiffs’ request for punitive damages can - - and should - - be dismissed. Under New York law, unless a statute establishes a cause of action and authorizes punitive damages, “only where the actions of the alleged tort-feasor constitute gross recklessness or intentional, wanton or malicious conduct aimed at the public generally or are activated by evil or reprehensible motives.” *Thomas v. Farrago*, 62 N.Y.S.3d 478, 480 (N.Y. App. Div. 2017). Plaintiffs must plead and prove conduct that is “intentional and deliberate, has fraudulent or evil motive, and has the character to outrage frequently associated with crime.” *Morsette v. ‘The Final Call’*, 764 N.Y.S.2d 416, 420 (N.Y. App. Div. 2003). The Complaint fails to allege fraud, for the reasons described *supra* Section III. Plaintiffs also do not adequately allege malicious conduct or gross negligence warranting imposition of punitive damages. Plaintiffs cannot state a claim for punitive damages simply by reiterating their allegations of ordinary negligence. *See Rice v. Univ. of Rochester Med. Ctr.*, 46 A.D.3d 1421, 1423, 849 N.Y.S.2d 134, 135 (2007) (punitive damages not available for ordinary negligence); *Anderson v. Elliot*, 807 N.Y.S.2d 101, 102 (N.Y. App. Div. 2005) (denying punitive damages where no malicious intent).

X. AMENDMENT WOULD BE FUTILE

Because the above causes of action are deficiently pled as a matter of law, and no Plaintiff can allege facts beyond those asserted because no such facts exist, amendment would be futile and should not be allowed. *See Steckman v. Hart Brewing, Inc.*, 143 F. 3d 1293, 1298 (9th Cir. 1998).

CONCLUSION

For the foregoing reasons, Uber's motion to dismiss pursuant to California law should be granted without leave to amend.

injunction to “ensure sexual assault in Uber vehicles is foreclosed to the greatest extent possible.” Compl. ¶ 35. For that relief, Plaintiffs must (but do not) plausibly allege an “actual and imminent” threat of similar sexual misconduct in the future. *Match.com*, 789 F. Supp. 2d at 1199.

1 DATED: April 1, 2024

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